Supreme Court, U.S.
FILED
FEB 11 1997
CLERK

No. 96-1096

In The

Supreme Court of the United States

October Term, 1996

M.A. BAHETH A/K/A M. ALLAM BAHETH; BAHETH RESEARCH & DEVELOPMENT LAB., AND BAHETH ENVIRONMENTAL & ANALYTICAL TESTING LAB., LTD. AND M.A. BAHETH & CO., INC.,

Petitioners,

versus

GUARANTY BANK AND TRUST COMPANY, NOW KNOWN AS REGIONS BANK; CHUCK DABADIE; CHRIS POPE AND FRANK CLARK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny this Petition for Writ of Certiorari for the following reasons:

STATEMENT OF THE CASE

Petitioners seek review by this Court of a decision by the United States Court of Appeals for the Fifth Circuit that affirmed a decision by the United States District Court for the Middle District of Louisiana. The trial court dismissed Petitioners' complaint under Federal Rule of Civil Procedure 12(b)(6). The complaint attempted to state six claims for relief, including a single federal claim based upon alleged violations of the Bank Tying Act (12 U.S.C. § 1971, *et seq.*). In affirming the lower court's dismissal, the Fifth Circuit held, in a one paragraph unreported decision, that (a) the district court did not commit reversible error in dismissing the federal claim (adopting "essentially" the reasons of the magistrate judge, which were also adopted by the district court); and (b) appellants abandoned all state law claims when they failed to challenge the district court's alternative basis for dismissal, *i.e.*, discretionary declination of supplemental jurisdiction, 28 U.S.C. § 1367(c).

Petitioners filed their complaint in January of 1995, seeking recovery against Guaranty Bank & Trust Company ("Guaranty") and certain individual officers (collectively "Respondents") in connection with an ongoing lending relationship with the Petitioners. The only allegation under the federal Bank Tying Act claim was that

Guaranty required additional security for its line of credit. On its face, the complaint was void of any allegation that the banking practices were unusual or were anything other than customary within the banking industry, a requisite to maintain a tying claim under 12 U.S.C. § 1972.

Once the federal claim fell, the district court properly exercised its discretionary authority to dismiss pendent state law claims.[1] Nevertheless, the court went on to find that the state law claims were time-barred under Louisiana law. The court rejected Petitioners' *contra non valentem* arguments,[2] based upon a review of the complaint. Paragraph 3 of the complaint acknowledges that the alleged wrongdoing could have been discovered by November of 1993, which is more than a year before Petitioners' suit was filed.

The only issue on appeal to the Fifth Circuit was whether the complaint, as amended, was sufficient to defeat dismissal. Appellants nevertheless concentrated on arguments not properly before the court on a motion to dismiss. Now, Petitioners have again failed to address the

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[1] 28 U.S.C. § 1367(c)(3).

[2] Petitioners have argued at each stage of the proceeding thus far that Guaranty's "fraudulent or intentional concealment or misrepresentation" triggers the doctrine of *contra non valentem*. Under Louisiana law, the doctrine permits suspension of the running of prescription, *inter alia*, until such time as the other party is no longer prevented from exercising his or her rights by the defendant's conduct or until the cause of action becomes known or at least knowable. See La. Civ. Code art. 3467 and *Corsey v. State Dept. of Corrections*, 375 So. 2d 1319 (La. 1979).

issue at hand, which is whether this Court should grant this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENTS FOR DENYING WRIT

This petition does not warrant review by this Court. The decision by the Fifth Circuit is not in conflict with decisions of any other Court of Appeals or state court of last resort. Further, this petition does not pose an important question of federal law, as evidenced by the fact that the Petitioners do not argue that the Fifth Circuit's interpretation of the Bank Tying Act is inconsistent with the Act's language.

Respondents urge this Court not to waste its resources on a case that does not present any compelling reasons for review. Granting this writ application will have no impact on litigants in general and will not clarify the law on standards of review under Rule 12(b)(6), supplemental jurisdiction, or the requirements necessary to maintain a federal tying arrangement claim.

ARGUMENT

Respondents respectfully oppose this Petition for Writ of Certiorari based on its complete failure to adhere to the guidelines for granting writs as set forth in Rule 10 of the Supreme Court Rules. The review sought is a matter of judicial discretion and review by this Court should only be granted for compelling reasons. Respondents have failed to set forth any compelling reasons.

I. The Fifth Circuit's decision is not in conflict with other courts of appeal or state courts of last resort.

Petitioners have failed to allege, and indeed cannot allege, that a conflict exists among the courts of appeal sufficient to warrant review by this Court. Determining the adequacy of allegations in a complaint within the context of a Rule 12(b)(6) motion is not a subject matter ripe for this Court's discretionary consideration.

Certiorari jurisdiction is principally designed to resolve conflicts among circuit courts and various state courts on the meaning of provisions of federal law.[3] In *Braxton*, unlike the instant petition, this Court granted the petitioners' writ based upon disagreement among the circuit courts as to the meaning of certain language in the federal sentencing guidelines.[4] Moreover, *Braxton* addressed an important issue of national interest, with far reaching implications on courts throughout the nation desirous of achieving uniform sentencing standards.

Conversely, Petitioners seek review of the Fifth Circuit's ruling affirming the district court's determination that the complaint allegations were insufficient and the district court's interpretation of unambiguous language concerning supplemental jurisdiction with respect to state law claims.

Similarly, Petitioners have failed to identify any state court of last resort that has decided a Bank Tying Act issue in a manner conflicting with another state court of

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[3] See *e.g.*, *Braxton v. U.S.*, 500 U.S. 344, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991).

[4] U.S.S.G. § 1B1.2(a), 18 U.S.C.A. App.

last resort.[5] No one, other than the Petitioners, benefits if this petition is granted.

II. There is no important federal question at issue that requires a decision from this Court.

Petitioners concede that the standards for maintaining a tying claim are set forth appropriately by the Ninth Circuit in *Rae v. Union Bank*.[6] The issue before the court in *Rae, supra,* was virtually identical to the case at bar. In *Rae,* the plaintiff's complaint, as amended, named the bank and certain employees and alleged various contract and tort theories. The court dismissed the suit, initially on diversity grounds, and after amendment, under Rule 12(b)(6) based on plaintiff's failure to state a claim under the Bank Tying Act and its discretion with respect to pendent state law claims. As in the instant case, the complaint merely made reference to loan conditions and extensions of credit accompanied by provisions designed to protect the bank's security. The court concluded that such requirements were simply not enough to state a claim, noting that even though the complaint had been amended once already, there were no allegations that the banking practices at issue were unusual in the industry.[7]

Petitioners do not ask this Court to review the *Rae* decision in light of the decision by the Fifth Circuit in this case, nor do they assert that *Rae* was decided contrary to a previous decision of this Court. The absence of an

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[5] U.S. Sup. Ct. Rule 10(b), 28 U.S.C.A.

[6] 725 F.2d 478 (9th Cir. 1984).

[7] *Rae* at page 480.

argument in favor of review is telling. Interpretation of the Bank Tying Act is not at issue, but rather whether the allegations contained in the complaint are adequate to defeat dismissal. Assuming *arguendo* that the Bank Tying Act needs clarification, any clarification should arise from more compelling circumstances.

III. The Fifth Circuit's standard for review under Rule 12(b)(6) has not been challenged by Petitioners.

The petition does not allege that the standard for review applied by the Fifth Circuit is contrary to this Court's or other circuit courts' standards. The Report and Recommendation of the Magistrate Judge[8] includes a section devoted to the well-defined framework developed by the Fifth Circuit for treatment of motions to dismiss under 12(b)(6).[9] Here, the Fifth Circuit wholly adopted the magistrate's report, finding no reversible error. At least implicitly, the appellate court determined that the

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[8] See Petitioners' Appendix C, App. 5.

[9] See *e.g., Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988) (motions to dismiss for failure to state a claim upon which relief can be granted generally viewed with disfavor and rarely granted); *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995) (motion to dismiss for failure to state a claim admits the facts alleged in the complaint, but challenges plaintiff's right to relief based upon those facts); and *Hirras v. National R.R. Passenger Corp.*, 10 F.3d 1142, 1145 (5th Cir. 1994) (complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief).

district court's ruling was consistent with its prior jurisprudence.[10]

To the contrary, Petitioners stubbornly insist that the lower courts erred in refusing to permit them an " . . . opportunity to have the complaint answer (*sic*), conduct discovery and offer evidence to support their claims."[11] That is not the standard courts employ on a 12(b)(6) motion to dismiss. The complaint, as amended, contains no allegations that the bank impermissibly benefitted from the cross-collateralization and additional guarantees that were executed to secure the various loans.

IV. The lower courts properly applied 28 U.S.C. § 1367 and Louisiana Civil Code article 3492 in dismissing Petitioner's pendent state law claims.

Petitioners have alleged in their complaint a single federal claim, based upon the Bank Tying Act. All remaining claims are state law claims dependent upon the court's supplemental jurisdiction. Petitioners fail to substantiate, and indeed have ignored the issue completely, why federal court jurisdiction should lie for the remaining state law claims. Declining to exercise supplemental jurisdiction is not only authorized by 28 U.S.C.

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[10] See footnote 9 above.

[11] See page 7 of Petitioner's Petition Writ for Certiorari.

§ 1367(c),[12] but was also encouraged by this court in *Gibbs*.[13]

> Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims *should* be dismissed as well. (Emphasis added).[14]

Moreover, as the Fifth Circuit ruled:

> Because appellants have failed to challenge the district court's alternative basis for the dismissal of the state law claims based on a discretionary declination of supplemental jurisdiction, these claims are considered abandoned.[15]

Petitioners have failed to address the abandonment or waiver issue with respect to the independent grounds for dismissal of all state law claims. The petition does not even hint at the possibility that the Fifth Circuit decided the abandonment issue inconsistently with other courts. Even if Petitioners had raised the issue, this Court does

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[12] 28 U.S.C. § 1367(c) provides in relevant part:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection(a) if –
>
> * * *
>
> 3. The district court has dismissed all claims over which it has original jurisdiction or . . .

[13] *United Mineworkers of America v. Gibbs*, 383 U.S. 715, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966).

[14] 86 S. Ct. at 1139.

[15] Per curiam opinion of the Fifth Circuit, at Petitioners' Appendix A, App. 2, citing *Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir. 1990) *cert. denied*, 498 U.S. 966 (1990).

not normally consider issues that have not been presented to the Court of Appeals.[16]

The courts below also held that dismissal of all state laws claims under Rule 12(b)(6) was proper on prescription grounds. On the face of the complaint and the amended complaint, Petitioners allege that they could not and did not discover Guaranty's fraudulent concealment of its wrongful acts until suits were filed by Guaranty in November, 1993, to enforce the commercial guarantees and cross-collateralization agreements.[17] Petitioners' complaint followed more than one year later. The claims were appropriately dismissed because the district court held that all of the state claims sounded in tort[18] and thus were subject to the liberative prescriptive period of one year under La. Civ. Code art. 3492.

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[16] See, *e.g.*, *Neeley v. Martin K. Eby Const. Co.*, 386 U.S. 317, 87 S. Ct. 1072, 18 L.Ed.2d 75 (1967) *rehearing denied*, 386 U.S. 1027, 87 S. Ct. 1366, 18 L.Ed.2d 471 (1967).

[17] See paragraph 3 of the complaint, at Petitioners' Appendix H, App. 33.

[18] See La. Civ. Code art. 2315 and F. Stone, *Louisiana Tort Doctrine*, § 229, Louisiana Civil Law Treatise, Vol. 12 (West Publishing Co. 1977).

CONCLUSION

For the reasons set forth hereinabove, the writ of certiorari should be denied.

Respectfully submitted,

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